SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1208

SAFEGUARD MUTUAL INSURANCE COMPANY, an Insurance Corporation of the State of Pennsylvania,

Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, a Body Corporate and Politic of the State of New Jersey and B. SMITH ELECTRIC COMPANY, INC., a Corporation.

Appeal From the Judgment of the Superior Court of New Jersey, Appellate Division.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

SAFEGUARD MUTUAL INSURANCE COMPANY, AN INSURANCE CORPORATION OF THE STATE OF PENNSYLVANIA,
Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, A BODY CORPORATE AND POLITIC OF THE STATE OF NEW JERSEY AND B. SMITH ELECTRIC COMPANY, INC., A CORPORATION.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

JURISDICTIONAL STATEMENT.

Appellant, Safeguard Mutual Insurance Company, Inc., an insurance corporation of the State of Pennsylvania, appeals for this Court to review the judgment of the Superior Court of New Jersey, Appellate Division, and the Order denying its Petition for Certification to the Supreme Court of New Jersey denying appellant's appeal.

CITATIONS TO OPINIONS BELOW.

The judgment of the Law Division of the Superior Court of New Jersey, Camden County, is unreported and is printed in Appendix C, *infra* p. 18. The Order of the Superior Court of New Jersey, Appellate Division is printed in Appendix F, p. 29, *infra*. The Order of the Supreme Court of New Jersey denying appellant's Petition for Certification is printed in Appendix G, p. 30, *infra*.

JURISDICTION.

The judgment of the Superior Court of New Jersey, Law Division, Camden County, was entered on January 20, 1967. Subsequently, an appeal was taken to the Superior Court of New Jersey, Appellate Division, and refused on October 16, 1967. Subsequently, a Petition for Certification to the Supreme Court of New Jersey was filed therein and an Order denying said Petition for Certification was entered on December 12, 1967, by the Supreme Court of New Jersey.

On February 29, 1968 Notice of Appeal was filed with the Superior Court of New Jersey, Appellate Division. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2) (Appendix H, p. 31, *infra*).

QUESTION PRESENTED.

1. Where Safeguard Mutual Insurance Company, appellant, a Pennsylvania domestic fire insurance company, licensed to do business in Pennsylvania, and not authorized to do business or licensed to do business in New Jersey, issued to B. Smith Electric Company, a resident Pennsylvania corporation, a Bid and Performance Payment Bond in Pennsylvania on a certain building project then contemplated by the Housing Authority of the City of Camden, appellee, in Camden, where the bid by the Electric Company was rejected by the Housing Authority because the bond did not include the New Jersey statutory requirement for an affirmative undertaking to pay the lawful claims of sub-contractors, laborers, material men and suppliers on the project, and when the project was bid a second time, the low bid was $15,670 higher than the Smith award had been, and the Authority proceeded with the project and filed suit in the Law Division, Camden County, of the Superior Court of New Jersey, against both Smith and Safeguard, seeking to recover the above sum, and at the trial in the Law Division of the Superior Court of New Jersey, Camden County, Smith defaulted and Safeguard, having moved to dismiss the action for lack of jurisdiction because of invalid service on the Commissioner of Banking and Insurance under the New Jersey statute (Title 17, N. J. S. A. §§ 51-1, et al.) providing, inter alia, that the issuance or delivery of contracts of insurance to residents of New Jersey or corporations authorized to do business therein, by an insurer not authorized to transact business in New Jersey, as Safeguard was not, constituted the New Jersey Commissioner of Banking and Insurance their attorney for service of process, and where service in fact was made on the New Jersey Commissioner of Banking and Insurance, where the contract of insurance (Bid and Performance Payment Bond) was issued to Smith Electric

Company, a Pennsylvania Corporation, in Pennsylvania at Safeguard's premises in Pennsylvania, and no transaction took place in New Jersey between Smith and Safeguard, and where Safeguard transacted no other business in New Jersey, and at the trial Safeguard introduced no testimony in its own defense, but preserved its motion to dismiss the Complaint on the grounds that service under the New Jersey statute was invalid under the circumstances herein and the Court lacked jurisdiction, and the trial court ruled there was no issue of fact to be resolved by the jury and then entered judgment against Safeguard for $11,000, the face amount of its bid bond, plus costs, which judgment was affirmed by the Superior Court of New Jersey, Appellate Division, which judgment was affirmed by the Supreme Court of New Jersey by denial of Safeguard's Petition for Certification, where the question of the trial court's lack of jurisdiction because of invalid service under the New Jersey statute was preserved on appeal, was it error for the trial court as affirmed on appeal to the Superior Court as affirmed by the denial by the New Jersey Supreme Court of Safeguard's Petition for Certification, to deny Safeguard's Motion to Dismiss for lack of jurisdiction based on the claim of invalid service on the New Jersey Commissioner of Banking and Insurance based on the New Jersey statute providing for such service as applied to Safeguard herein because the application of the New Jersey statute under these circumstances offended Section 1 of the XIV Amendment to the United States Constitution.

STATUTES INVOLVED.

The statutory provision involved is the New Jersey Constructive Service Act, N. J. S. A. 17: 51-1, subsection (a); the Due Process Clause of the United States Constitution, Amendment XIV, Section 1. They are printed in Appendices I and J, *infra*, pp. 32 and 38.

STATEMENT.

On June 18, 1964, the appellant, Safeguard Mutual Insurance Company, a Pennsylvania Domestic Mutual Fire Insurance Company situated in Pennsylvania, issued to B. Smith Electric Company, Inc., a Pennsylvania corporation, in Pennsylvania a certain bid bond in the penal sum of $11,000.00 to secure a bid which Smith subsequently submitted on a certain building project then contemplated by the Housing Authority of the City of Camden. The bid bond by its terms specifically undertook to secure only that Smith, if the successful bidder, would enter into a written contract for the work bid with the Authority and give a bond for the faithful performance and proper fulfillment thereof.

Upon the opening of the bids on the project in question, it was ascertained that Smith was the lowest responsible bidder, and the Authority awarded the contract to Smith and presented it with a form of contract to execute and return to the Authority. On July 15, 1964, Safeguard issued in Pennsylvania its Performance Payment Bond to Smith, in Pennsylvania, wherein it bound itself as surety to the Authority for the faithful performance and proper fulfillment by Smith of the obligations of its building contract with the Authority.

Smith then presented to the Authority the form of contract provided for the project duly executed on its behalf and the "Performance Payment Bond" that Safeguard had issued in Pennsylvania with respect to this project. The Authority, however, refused to execute the said contract and declined to accept the Safeguard "Performance Payment Bond" on the grounds that the form of said bond was not as had been set forth in the building contract specifications. The departure referred to by the Authority was

the fact that the Safeguard bond did not specifically include an affirmative undertaking to pay the lawful claims of subcontractors, laborers, material men and suppliers on the contract.

The Authority argued that it was required under the New Jersey Statutes to demand a bond in the form as set forth therein and demanded that Safeguard issue such a bond to Smith. Safeguard declined to do so and Smith did not procure the requested form of bond elsewhere, as a result of which the Authority rescinded the award of said contract to Smith and readvertised the project for bids.

When the project was bid a second time, the low bid was $15,670.00 higher than the Smith award had been. The Authority proceeded with the project and filed suit in the Law Division against both Smith and Safeguard seeking to recover the above sum. At the trial below, the then defendant, Smith, defaulted. Safeguard introduced a Motion to Dismiss the action on the grounds of invalid service and lack of jurisdiction in the court below under R. S. N. J. 17:51-1 subsection (a). This Motion was denied prior to trial, and Safeguard introduced no testimony in its own defense at trial. The trial court ruled that there were no issues of fact to be resolved by the jury and then entered judgment against Safeguard for $11,000.00, the face amount of its bid bond, plus costs, on the theory that Safeguard in its bid bond obligated itself to guarantee procurement of a Payment and Performance Bond in the form prescribed by the New Jersey Statutes, which it found Safeguard failed to do, thus precipitating the rebidding of the project at a loss to the Authority in excess of $11,000.00. This judgment appellant appealed to the Appellate Division of the Superior Court of New Jersey. In that appeal it argued that the New Jersey Commissioner of Banking and Insurance was not a duly constituted agent of appellant capable of receiving legal process on its behalf, since it had not im-

pliedly designated the Commissioner of Insurance as its authorized agent to accept service of process by merely issuing in Pennsylvania, to a Pennsylvania corporation, a bid bond which the purchasers subsequently transported into New Jersey and submitted as part of a bid on a public project. The Superior Court of New Jersey, Appellate Division, on October 16, 1967, affirmed the judgment of the Law Division of the Superior Court, Camden County. Subsequently, a Petition for Certification to the Supreme Court of New Jersey was filed by appellant and on December 12, 1967, this Petition for Certification was denied with costs by the Supreme Court of New Jersey. Notice of Appeal was then filed on behalf of appellant herein.

STAGES IN THE PROCEEDINGS IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED.

Prior to trial appellant moved for an Order for a summary judgment, or judgment on the pleadings or for an Order dismissing the Complaint on the grounds that appellant had not done any of the acts enumerated in R. S. N. J. 17:51-1 subsection (a) to render said appellant subject to service of process through the Commissioner of Banking and Insurance of the State of New Jersey in the matter by said statute made and provided. On December 23, 1964, this Motion was denied by the Honorable Judge Anthony C. Mitchell, J. C. C., sitting in the Law Division, Camden County, of the Superior Court of New Jersey. This Order and the Affidavit pertinent thereto are set forth in Appendices A and C, pp. 15, 16 and 18-20, *infra*. Subsequently, at the trial, appellant preserved the denial of this motion for summary judgment based on invalid service of process as an appealable interrog Order. The trial court ruled that this matter was not appealable until after the trial court had affixed judgment and the Court stated

that the motion was thereupon preserved. N. T. 113, 114, see Appendix E, p. 27, *infra*.

This question was preserved on appeal to the Superior Court of New Jersey, Appellate Division. In its questions presented No. 4 appellant stated: "Has this foreign surety impliedly designated the Commissioner of Insurance as its authorized agent to accept service of process by merely issuing in Pennsylvania, to a Pennsylvania Corporation, a bid bond which the purchaser subsequently transported into New Jersey and submitted as part of a bid on a public project." Brief for appellant pp. 1 and 2. See certification of Record from Superior Court. This question is then presented on page 14 of the Brief as point 3 therein. See certification of Record from Superior Court.

The Superior Court of New Jersey, Appellate Division denied appellant's appeal on October 16, 1967. In its per Curiam opinion the Court stated: "We have examined the Court's decision on plaintiff's motion for judgment and are in agreement with such decision. Accordingly, the judgment is affirmed." See certification of Record from Superior Court.

Appellant again raised the question of invalid service under the New Jersey statute in point 3 in its Petition for Certification to the Supreme Court of New Jersey. See point 3 of appellant's Petition for Certification. See certification of Record from Superior Court. The Petition for Certification was denied by the Supreme Court of New Jersey on December 12, 1967.

PRESENTATION OF THE GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL.

1. This appeal is predicated upon the contention that as applied to the facts of this case the New Jersey statute

providing for constructive service is contrary to Section 1 of the Fourteenth Amendment to the United States Constitution. At the trial of this case the appellant preserved its prior motion for summary judgment and a dismissal of the Complaint on the ground that the statute was invalid as applied. This question was also preserved on appeal. In accordance with the doctrine of *Hanson v. Denckla,* 357 U. S. 235 (1958), a substantial federal question of jurisdiction has been presented. Thus jurisdiction is conferred upon this court under 28 U. S. C. Section 1257(2), according to the doctrine of *Hanson v. Denckla, supra.*

The appellant here was a foreign insurance corporation, organized as a domestic mutual fire insurance corporation in Pennsylvania, not authorized to do business in the State of New Jersey, which issued the surety bonds in question in Pennsylvania to a resident of Pennsylvania. No basis existed under R. S. N. J. 17:51-1, S. subsection (a) to justify the designation of the New Jersey Commissioner of Banking and Insurance as appellant's agent to receive service of process. Appellant contended throughout the proceedings beginning with its pretrial motion for summary judgment and dismissal of the Complaint which was preserved at the time of trial and on appeal to the Appellate Division of the Superior Court of New Jersey that the Court never obtained proper jurisdiction over it and was not empowered to make an adjudication as to its liability. Under these factual circumstances the New Jersey statute providing for such constructive service was invalid under Section 1 of the Fourteenth Amendment to the United States Constitution. See Appendix B, *infra* for the full text of the New Jersey Statute and Section 1 of the Fourteenth Amendment.

Statutes providing for constructive service on out of state insurance companies have been sustained as valid on

the theory that by engaging in local business the foreign insurance company can consent to be sued in the local courts. Couch on Insurance 2d, § 21:81; *Lafayette Ins. Co. v. French,* 18 How. 404, 15 L. ed. 451; *Ex parte Schollenberger,* 96 U. S. 369, 24 L. ed. 853.

Under the statutes relating to service of process upon foreign insurers doing business within a state, the business must generally be more than isolated acts, and must be of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which, for instance, it is served, and in which it is bound to appear when a proper agent has been served with process. Couch on Insurance, 2d Section 21:49.

Insuring property in one state, when the application is received at, and the policy is issued from, the home office in another state, does not constitute doing business within the state in which the property is located. *Hussey Tie Co. v. Knickerbocker Ins. Co.,* (CA Mo.) 20 F. 2d 892, cert. den. 275 U. S. 569, 72 L. ed. 431, 48 S. Ct. 141; *Palmetto F. Ins. Co. v. Beha* (DCNY) 13 F. 2d 500.

As applied here, the New Jersey statute should have been declared invalid as offensive to Section 1 of the Fourteenth Amendment to the United States Constitution. The New Jersey statute R. S. N. J. 17: 51-1 subsection A provides as follows:

> "Any of the following acts in this State, by an insurer not authorized to transact business in this State: (1) the issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other

transaction of business in relation to such contracts of insurance, is equivalent to and shall constitute an appointment by such insurer of the Commissioner of Banking and Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process and a complaint in any action or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process and a complaint is of the same legal force and validity as personal service of the same legal force and validity as personal service of the same in this State upon such insurer."

The facts in this case reveal that appellant in Pennsylvania issued a bid and performance bond to B. Smith Electric Company, a Pennsylvania corporation to its agent in Pennsylvania and at no time performed any acts or conducted any business in the State of New Jersey. The act itself stipulates that the actions must take place in the State of New Jersey and that there must be involved the issuance or delivery of contracts of insurance to residents of New Jersey or corporations authorized to do business therein in New Jersey R. S. N. J. 17:51-1(a). The record clearly reveals that such was not the case here.

In the instant case the Housing Authority of the City of Camden, appellee, obtained service upon the appellant by serving the New Jersey Commissioner of Banking and Insurance under the New Jersey statute. This service was held to be valid under the New Jersey statute by the trial court and the Superior Court of New Jersey, Appellate Division, whose judgment was affirmed by the denial of appellant's Petition for Certification by the Supreme Court of New Jersey. This in effect sustained the validity of the

New Jersey statute which appellant now contends as applied was offensive to Section 1 of the Fourteenth Amendment to the United States Constitution.

Under these circumstances, it is clear that there is an absence of affiliating circumstances "Without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction in persona) or affecting interests in property (jurisdiction in rem or quasi in rem). *Hanson v. Denckla, supra.* As in *Hanson v. Denckla, supra* the jurisdiction in this case is not such as arises out of an act done or transaction consummated in the forum State.

In *McGee v. International Life Insurance Company,* 355 U. S. 220, jurisdiction was obtained by statutory service on a non-resident insurance company and held valid. In the *McGee* case the contract was delivered in California, the premiums were mailed from there, and the insured was a resident of that State when he died. Mr. Justice Black held that California had a manifest interest in providing effective means of redress for its residents when their insurers refused to pay claims.

As Chief Justice Warren points out in *Hanson v. Denckla, supra,* this case is different from *McGee* where the non-resident defendant solicited a reinsurance agreement with a resident of California. In *McGee, supra* the court upheld jurisdiction because the suit was based on a contract which had substantial involvement with the State in which service was obtained.

In the instant case there was absolutely no contact by appellant with the State of New Jersey in terms of its dealings with appellee, B. Smith Electric Company, a Pennsylvania corporation, in Pennsylvania.

Under these circumstances, a substantial federal question has been presented as to the validity of the constructive service provided for by the New Jersey statute upon a

foreign corporation not authorized to do business in New Jersey whose only contact is to issue a contract of insurance, namely a bid and performance bond, to a Pennsylvania corporation, in Pennsylvania, where such Pennsylvania corporation happens to be authorized to do business in New Jersey. The tenuity of such connection with the State of New Jersey does not establish a valid basis for the constructive services of process provided for by the New Jersey statute and thus deprives appellant of its property rights without due process of law under Section 1 of the Fourteenth Amendment to the United States Constitution.

Appended to this jurisdictional statement in Appendices C, D, E, F and G, *infra* are copies of the orders, Judgments and Decrees appealed from in the State Courts of New Jersey, along with the opinions pertinent thereto. See pp. 18, 21, 24, 29 and 30.

CONCLUSION.

For the foregoing reasons, this appeal should be granted.

Respectfully submitted,

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